

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF VIRGINIA  
ALEXANDRIA DIVISION

-----x  
UNITED STATES, et al., : Civil Action No.:  
: 1:23-cv-108  
Plaintiffs, :  
versus :  
: Friday, June 2, 2023  
GOOGLE LLC, : Alexandria, Virginia  
: Pages 1-37  
Defendant. :  
-----x

The above-entitled motions hearing was heard before  
the Honorable John F. Anderson, United States Magistrate  
Judge. This proceeding commenced at 11:02 a.m.

A P P E A R A N C E S:

FOR THE PLAINTIFFS: KRISTIN STARR, ESQUIRE  
OFFICE OF THE UNITED STATES ATTORNEY  
2100 Jamieson Avenue  
Alexandria, Virginia 22314  
(703) 299-3700

KELLY GARCIA, ESQUIRE  
JULIA TARVER WOOD, ESQUIRE  
UNITED STATES DEPARTMENT OF JUSTICE  
ANTITRUST DIVISION  
450 Fifth Street, NW  
Washington, D.C. 20530  
(202) 894-4266

TYLER HENRY, ESQUIRE  
OFFICE OF THE ATTORNEY GENERAL  
OFFICE OF THE SOLICITOR GENERAL  
202 North Ninth Street  
Richmond, Virginia 23219  
(804) 786-7704

A P P E A R A N C E S:

FOR THE DEFENDANT: ANDREW EWALT, ESQUIRE  
SARA SALEM, ESQUIRE  
FRESHFIELDS BRUCKHAUS DERINGER, LLP  
700 13th Street, NW  
10th Floor  
Washington, D.C. 20005  
(202) 777-4500

JOSEPH BIAL, ESQUIRE  
AMY MAUSER, ESQUIRE  
PAUL, WEISS, RIFKIND,  
WHARTON & GARRISON LLP  
2001 K Street, NW  
Washington, D.C. 20006  
(202) 223-7300

CRAIG REILLY, ESQUIRE  
LAW OFFICE OF CRAIG C. REILLY  
209 Madison Street  
Suite 501  
Alexandria, Virginia 22314  
(703) 549-5354

COURT REPORTER: STEPHANIE M. AUSTIN, RPR, CRR  
Official Court Reporter  
United States District Court  
401 Courthouse Square  
Alexandria, Virginia 22314  
(571) 298-1649  
S.AustinReporting@gmail.com

COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

P R O C E E D I N G S

THE DEPUTY CLERK: United States of America, et al. versus Google LLC, Civil Action Number 23-cv-108.

MS. STARR: Good morning, Judge Anderson. Kristin Starr from the U.S. Attorney's Office. And with me are my colleagues from the Department of Justice, Kelly Garcia and Julia Tarver Wood.

I'll let the counsel from the State AG's Office introduce themselves.

THE COURT: Who's going to be arguing for the United States?

MS. STARR: Kelly Garcia will be arguing for the United States, Your Honor.

THE COURT: Thank you.

MS. GARCIA: Good morning, Your Honor.

THE COURT: Good morning.

MS. TARVER WOOD: Good morning, Your Honor.

MR. HENRY: Good morning, Your Honor. Ty Henry from the Virginia Attorney General's Office on behalf of the plaintiff states.

THE COURT: Thank you.

MR. EWALT: Good morning, Your Honor. Andrew Ewalt from Freshfields on behalf of Google. I'm joined by Joseph Bial from Paul, Weiss, who will be arguing this morning; as well as Sara Salem from Freshfields;

1 Amy Mauser from Paul, Weiss; and, of course, Craig Reilly.

2 THE COURT: Okay. Thank you. All right.

3 Well, I got a motion that has two parts in front  
4 of it. I want to deal with the custodian issue first and  
5 deal with that completely, and then we'll get to the other  
6 issue after that.

7 So let's go ahead -- and I've read what everybody  
8 submitted. You know, it -- I appreciate your trying to keep  
9 the briefs brief, but there's -- and this goes to both of  
10 the issues, but it relates a little less so to the custodian  
11 issue.

12 A significant amount of substantive information  
13 really hasn't been provided to me. You talk about we  
14 identified 63 custodians. There's no information  
15 relating -- at least provided to me, I assume you all know  
16 it -- as to, you know, who these custodians really were,  
17 what they really did, what their role really was based on  
18 the information that you provided. And, you know, they  
19 provided some information as to those 63, and you've gotten  
20 some information, you haven't gotten some information.  
21 They've agreed to produce custodians or follow-on custodians  
22 for some but not the others.

23 But I don't have any real substance behind the  
24 numbers, and that's a little concerning. And I know your  
25 argument is, you know, they had information back in -- or

1 the person who was in this position back in 2020, it was  
2 agreed that they had substantive information and their  
3 material issue had been reviewed and looked at. And I -- I  
4 take it from your argument it is -- I am to assume that that  
5 position, or whatever the person did in that position in  
6 2020, has an ongoing relationship, need or involvement in  
7 the issues in this case. But, I mean, that's an assumption;  
8 not something that has really been shown to me at this  
9 point.

10           You know, clearly, Google has acknowledged that in  
11 some respects, and that some of the successor custodians  
12 they've agreed to either are already on the list and are  
13 currently doing jobs, functions, responsibilities that  
14 are -- they acknowledge are -- but I'm at a little bit of a  
15 loss as to how is it that I just assume a custodian in 2020,  
16 a new person in that job duties and responsibilities is  
17 going to have information between October of 2020 and now.

18           MS. GARCIA: Your Honor, good morning.  
19 Kelly Garcia for the United States.

20           So today we're coming before you on only one  
21 remaining issue. With respect to the issue of successor  
22 custodians, this morning we received an email from Google's  
23 counsel in which they agreed to identify the remaining  
24 successor custodians in order to cover the post-October 2020  
25 time period and add those custodians to their list. As we

1 responded this morning, we consider this issue resolved.

2 THE COURT: Okay. Well then, that whole  
3 discussion was for nothing. I guess I should have asked if  
4 there any updates on that issue before I came in.

5 Well, that's -- so they're going to provide you  
6 the information on the 18 of the 63 that you didn't have.  
7 The 11 that they said, you know, we have successors for,  
8 they're going to be looking at their documents and providing  
9 information from October of 2020 to the present; is that  
10 your understanding?

11 MS. GARCIA: Exactly, Your Honor.

12 THE COURT: Is that consistent with what -- I had  
13 a hearing at 10. I didn't see any filings or anything to  
14 indicate that that got worked out.

15 But is that the agreement for --

16 MR. BIAL: Your Honor, yes. Joseph Bial for  
17 Google. That is the agreement.

18 THE COURT: Okay. Well, thank you very much.

19 Let's move to the next issue, which is, honestly,  
20 even more confusing to me. And my concerns with what I have  
21 in front of me today, you know, you've got the document  
22 requests, you've got an -- well, first of all, have you  
23 worked it out, I guess should be my first question, and if  
24 not, then I'll continue to have some discussions.

25 MS. GARCIA: I appreciate that, Your Honor. We're

1 still at an impasse, so this is still an issue that we would  
2 like resolution on today.

3 THE COURT: Okay. Well, whether you're able to  
4 get a decision from me today will be -- we'll find out.

5 But the thing that I am -- again, I'm not sure I  
6 fully understand based on the briefing. And, again, I  
7 recognize you've got a lot of people who are dedicating  
8 their full time and attention to this case and know a lot  
9 more about this case than I do.

10 The issue -- overarching issue is they have agreed  
11 to provide you with 9 of the 12 source code requests. The  
12 three, the last three, they've said, you know, either we  
13 understand, we don't think it's relevant, we don't really --  
14 you know, too hard to figure out what it is.

15 I don't understand when they say they're going to  
16 be producing all the source code as to a particular project,  
17 tool, whatever, what it is that's in the remaining amounts  
18 that is not included in the first amount here.

19 So, help me understand what it is in those three  
20 areas that seem to be at issue. And I know there are more  
21 than just that, but I think that's a key issue that we need  
22 to address.

23 So -- and, again, you know, the first nine are  
24 pretty specific. "This project," they know what that  
25 project is, they can go look. The others are a little

1 bit -- you know, source code that relates to -- pretty  
2 amorphous. You know, how you do X, Y, Z, as opposed to a  
3 particular project, proposal, whatever.

4 So let me hear about that; okay?

5 MS. GARCIA: Yes, Your Honor.

6 As counsel acknowledged on a meet-and-confer  
7 yesterday, the way in which we described the last three  
8 categories of our RFP may not be how Google's own engineers  
9 describe it. What we've tried is -- tried to do is  
10 describe, with good-faith efforts, other information that we  
11 believe would be relevant, although we have no code name or  
12 specific other identifier in order to be able to give more  
13 information at this time.

14 THE COURT: Well, you know, this Project Bernanke  
15 or Poirot or the dynamic revenue share or the predictive  
16 highest bidder, the Smart Bidding, do they encompass what  
17 you're asking for in any other requests or not?

18 MS. GARCIA: Your Honor, they may. And if I --  
19 with this opportunity, I would like to be able to describe  
20 those three remaining requests in plain language.

21 So with respect to -- with respect to RFP 39  
22 Part 10, we've given a functional description here asking  
23 for the source code or algorithms that choose what  
24 exchanges, DSPs and Ad Networks are called on by each of the  
25 Google products at issue in this case, Google Ad Manager,



1 DV360 and Google Ads.

2 To the extent those are covered by any of the code  
3 names that we've identified, we appreciate Google's efforts  
4 to search for and identify responsive information, but our  
5 concern is that if we don't already know a certain name of a  
6 project, particularly a newer project that perhaps postdates  
7 several documents and depositions that happened during the  
8 investigation, we don't want to suggest that those -- that  
9 source code or those algorithms are not relevant here.

10 THE COURT: So, I mean, the document request that  
11 you have served -- and that's what's in front of me, to some  
12 extent -- and looking at 10: "Any curation function for the  
13 related products that determine which exchanges, DSPs and Ad  
14 Networks to call."

15 MS. GARCIA: Yes, Your Honor.

16 THE COURT: So go back and tell me again what that  
17 really means.

18 MS. GARCIA: So by "curation function," we're  
19 simply referring to the function of the algorithm that  
20 chooses which exchanges, DSPs or Ad Networks are called by  
21 the program. We're limiting our request to algorithms and  
22 source code that are specific to Google Ad Manager, DV360  
23 and Google Ads.

24 THE COURT: Okay. All right. What about 11?  
25 "Any bid, price floor or auction optimization algorithm" --

1 any -- "product or feature."

2 MS. GARCIA: Yes, Your Honor.

3 With respect to Subsection 11, we believe we've --  
4 we're asking for source code for any Google bid, price floor  
5 or auction optimization algorithm, product or feature, and  
6 we've provided counsel and in the papers some references to  
7 complaint paragraphs in an attempt to give as much  
8 information as we possibly could.

9 THE COURT: Why don't you think that's already  
10 included in the, you know, other project information and  
11 other things that you've asked for in 1 through 9?

12 MS. GARCIA: Your Honor, it may very well be  
13 included in those responses, but given the information that  
14 we have to date and the information that we have from  
15 Google, we cannot say for sure that it is.

16 THE COURT: All right. And 12.

17 MS. GARCIA: Twelve asks for source code  
18 pertaining to any automated means or manner of bidding,  
19 whether on individual bids or a campaign-level basis.

20 Again, the complaint discusses these issues, and,  
21 unfortunately, we don't have specific code names or other  
22 identifiers that we can provide to Google based on the  
23 information that we've been able to gather up to this point;  
24 however, we believe that this is sufficient information for  
25 Google to be able to take back to its client. You know, the

1 teams of engineers that work at Google, we suspect that they  
2 have more information on what exactly these automated means  
3 are called, and, unfortunately, we cannot provide any more  
4 information other than what we have.

5 THE COURT: Okay. Well, what efforts have you  
6 taken, other than good-faith consultation with counsel, to  
7 figure out what it is? I mean, have you taken a 30(b)(6) on  
8 a very narrow area as to, you know, what is it that we need  
9 to do to, you know, figure out about, you know, curation  
10 function for products that determine the exchanges? Or the  
11 bid floor price auction optimization algorithm, product or  
12 feature? Or try and figure out something specific?

13 I mean, the problem is, if you're asking me to  
14 order them to do something that is vague -- well, if it's  
15 something they're already going to be providing, that's not  
16 a problem, and I'll hear whether it really is, these three  
17 things are subsumed in 1 through 9 or not. And I understand  
18 your concerns. If a -- you know, if a directed reading of  
19 some of these projects or programs or code names is limited,  
20 if they limit it to that particular thing, and it also does  
21 or relates to other things that you want to get some other  
22 information that relates to that, but 1 through 9 seem very  
23 specific; 10, 11 and 12 seem pretty broad, maybe vague,  
24 sometimes catch-all. Those are all terms that come to mind  
25 when you read those three compared to the first nine. And I

1 don't want to be in a position of ordering somebody to do  
2 something that isn't specific.

3 So what have you done in order to get specific  
4 information from Google other than through lawyers and  
5 communications with counsel?

6 MS. GARCIA: Your Honor, during the course of our  
7 investigation, we took several depositions, as you know. We  
8 posed these questions to individuals who we understood were  
9 involved in the creation of this code, and those individuals  
10 were not able to give us a complete understanding of the  
11 code itself. A lot of the testimony that we received  
12 suggested that there are several engineers across Google who  
13 work on issues like this. For that reason, we have not  
14 pursued a 30(b)(6) at this time.

15 This case is -- at its core, it's about  
16 programmatic digital advertising tools, which is its code.  
17 We've done our best to identify code names, and we have in 1  
18 through 9, but, otherwise, we've done our best to articulate  
19 what we are looking for.

20 What we told Google yesterday on a meet-and-confer  
21 was that if Google's engineering teams have made good-faith  
22 efforts to find responsive source code and cannot find it,  
23 we would accept an affidavit from a Google employee with  
24 knowledge explaining that they've taken steps to identify  
25 this information and that it doesn't exist.

1           We've also made clear that, in addition to the  
2 affidavit, we would ask that Google stipulate that neither  
3 party would rely on source code if it comes to light later  
4 on that this information does, in fact, exist.

5           THE COURT: Okay. There's a fair amount of  
6 discussion in your papers about your experts, him or her,  
7 needing additional information and needing roadmaps and  
8 guidelines and those kinds of things. I don't have anything  
9 from an expert; I only have you saying your experts may need  
10 this kind of information.

11           What's the basis for your statement, and why is it  
12 that you think what they have agreed to provide -- and they  
13 have, you know, outlined in their opposition some  
14 information they've agreed to search for and provide  
15 relating to source code that they've agreed to provide, and  
16 why is any more necessary?

17           MS. GARCIA: Your Honor, the basis for this  
18 request was from -- it was a request from our expert teams  
19 and their consultation teams.

20           How they explained it to us -- I'm not someone who  
21 has a degree in computer science, so I can't pretend to have  
22 firsthand knowledge of this. But the way that they  
23 explained it to us was that they expect, having done this  
24 type of work before, that there exists data dictionaries,  
25 user manuals and other explanatory materials in the ordinary

1 course of business at Google. They told us that since  
2 Google is a large organization and no one person is likely  
3 to have a full understanding of all of the relevant code  
4 across the company, they expect manuals exist to explain  
5 these materials to someone within the organization who works  
6 in a different department or someone who is new to the  
7 organization, for example, a new hire.

8 THE COURT: Well, why do they need that  
9 information? I understand they say they may have that  
10 information, they're a big company, and they may have  
11 guidelines and things, but why is it that your experienced  
12 team of experts would need, you know, a roadmap from Google  
13 to look at the information that they --

14 MS. GARCIA: Your Honor --

15 THE COURT: -- have gotten or will be getting?

16 MS. GARCIA: Thank you, Your Honor.

17 From what we have agreed to with plaintiffs in  
18 order to protect source code and respect the confidentiality  
19 of the source code, our experts will be subject to  
20 significantly restrictive provisions when they do access the  
21 source code. They can only go in from a certain point in  
22 the morning to a certain point in the night. They can only  
23 go in and be observed by someone else. They can take notes,  
24 but they can't write down any portion of the source code.  
25 All of these strict conditions are agreed to already by the

1 parties in the protective order.

2 THE COURT: And they're usual. I mean, there's  
3 nothing really unusual about that when you're dealing with  
4 source codes.

5 MS. GARCIA: So, Your Honor, what we're attempting  
6 to do is arm our experts with the information that they've  
7 told us they would need in order to understand, as  
8 outsiders, not as Google engineers, the information that  
9 they're reviewing when they go in to look at the source  
10 code.

11 They are also doing this rather quickly. And part  
12 of the reason why we've asked for Your Honor's intervention  
13 at this stage is that we've -- you know, to date, we haven't  
14 had a discussion about concrete timing, when our experts  
15 will have access to this source code, when everything will  
16 be up and ready. The proposal that we've seen was a bit  
17 ambiguous with respect to whether Google has identified any  
18 of the source code to this date.

19 Yesterday on the meet-and-confer, I put the  
20 question to Google and was told that they cannot confirm  
21 that they've identified any of the responsive source code.

22 THE COURT: Not even for the nine items that  
23 they've agreed?

24 MS. GARCIA: That's my understanding, Your Honor.

25 THE COURT: Okay. Well -- all right.

1 Well, what else would you like to say before I  
2 hear from Google's counsel?

3 MS. GARCIA: Your Honor, I'd like the opportunity  
4 to address any other specific questions you have with  
5 respect to, you know, our efforts to reach agreement up to  
6 this point, any questions you have with respect to why we  
7 believe the source code is so crucial to our case, or any  
8 other questions you have in general.

9 THE COURT: Well, I mean, I need to hear from  
10 Google's counsel about what is not in 1 through 9 that may  
11 be covered by the -- if you give a fair reading to 10, 11  
12 and 12 and not a broad interpretation of that. I think  
13 you've tried to explain to them what it really is that  
14 you're looking for and want to have, and I think, you know,  
15 are entitled to get that kind of information.

16 MS. GARCIA: Thank you, Your Honor.

17 THE COURT: So let me hear from counsel. Thank  
18 you.

19 MS. GARCIA: Thank you.

20 THE COURT: First, I want to hear about the --  
21 there are nine areas in which you have agreed to provide  
22 source code from.

23 MR. BIAL: That's correct, Your Honor.

24 THE COURT: And where are you in the process of  
25 getting that so that can start being looked at?



1 MR. BIAL: Sure. So let me just take a step back.

2 The way that we identify that, and you mentioned  
3 those seem to be less vague, and that's Request for  
4 Production Number 39 that includes the 12 categories.

5 THE COURT: Right.

6 MR. BIAL: So we work with the folks at the  
7 company to, you know, find out what does that mean, and, in  
8 those instances, as you mentioned, those are projects and so  
9 forth. So we're able to identify those. And then it's  
10 still -- obviously it's the company's secret sauce, if you  
11 will, but we've got the protocol here for source code. So I  
12 think it's just going through the mechanics of that in order  
13 to produce 1 through 9.

14 THE COURT: Okay. I understand that.

15 Where are we in the mechanics of doing that --

16 MR. BIAL: Oh, it's --

17 THE COURT: -- so that we can actually, you know,  
18 start doing something -- that is, the plaintiffs can start  
19 seeing that information and making a determination as to  
20 whether, you know, the information that you're providing is  
21 going to be sufficient or not?

22 MR. BIAL: Correct. No, Your Honor. That's a  
23 fair question.

24 So that's actually -- right now we're in the  
25 process of getting that prepared for production, but we're

1 still going to have to figure out who is going to receive  
2 it, and that might take, you know, a bit of time because  
3 we've got to go through paragraphs 2 and 3 of the --

4 THE COURT: "Prepared for production," let's focus  
5 on that issue now.

6 MR. BIAL: Right.

7 THE COURT: When is it that you are anticipating,  
8 if all of the other items get worked out, that you will be  
9 in a position to allow somebody to go into the room and  
10 start looking at this source code?

11 MR. BIAL: A couple weeks.

12 THE COURT: A couple of weeks?

13 MR. BIAL: Well, here's the thing, Your Honor --

14 THE COURT: You've had these requests for how long  
15 now?

16 MR. BIAL: Yeah, no. And it's really not that  
17 part of it; it's really Sections 2 and 3 of the protocol.  
18 They have to provide names to us, and then we have to vet  
19 those names.

20 THE COURT: You may not have understood my  
21 question.

22 Assuming all -- and I want to know on the Google  
23 side, when has that -- when will you be prepared to have all  
24 the source code that you have agreed to produce available to  
25 be reviewed?

1 MR. BIAL: Within a week.

2 THE COURT: Okay. All right. So, that, I see as  
3 being acceptable. You know, the idea that it's going to be  
4 weeks or months --

5 MR. BIAL: No, I didn't intend to --

6 THE COURT: You know, we've got a process, we've  
7 got a procedure, we've got to work through things, we're  
8 preparing. You know, I -- we don't have enough time in this  
9 case to not be doing what you have agreed to do. You know,  
10 if we talk about a timetable for things that I order you to  
11 do that you agreed to do, it may be different than that.  
12 But -- okay.

13 So assuming the other issues, you know, who's  
14 going to look at it, get the room set up and those kinds of  
15 things, you would be in a position to have their experts be  
16 able to start the process of looking at this information  
17 within around a week; is that accurate?

18 MR. BIAL: That's correct.

19 THE COURT: All right. So tell me what the  
20 problem is with 10, 11 and 12.

21 MR. BIAL: Yeah. It's -- the question on 10, 11  
22 and 12, I think is, it's not that -- I mean, these are  
23 intelligent individuals that are trying to help identify  
24 what we would be producing. And let me give an example. So  
25 in the meet-and-confer that we had yesterday, Ms. Garcia

1 mentioned bidding, which -- for 10, 11 and 12. We went to  
2 the client yesterday, and we're in a position to produce  
3 that, if that's what they're actually intending to receive.  
4 I think a meet-and-confer was probably the way to go, but we  
5 are where we are.

6 But that -- once we understood it's, you know,  
7 potentially bidding, then we were in a position to go and  
8 start collecting that for production. But, again, that is a  
9 question about is that all they want, or are there other  
10 things they want, and we don't know.

11 THE COURT: Okay. In these meet-and-confer  
12 sessions, is it just the lawyers, or are technical people  
13 involved? And I don't mean that lawyers can't also have  
14 technical skills and capabilities, but I'm talking about  
15 in-house technical people involved in the discussions to try  
16 and have a fair exchange of information as to what we need  
17 and how can you get it together.

18 MR. BIAL: These have been counsel.

19 THE COURT: Okay. Have you all explored the  
20 possibility of having the people who really understand  
21 things completely -- without things being lost in  
22 translation to some extent -- having a discussion with  
23 counsel to try and flesh some of these issues out?

24 MR. BIAL: No, we have not yet done that. I think  
25 we would be open to doing that. I think to the extent that

1 they have more information or can give us more color, then  
2 we could find the right individual. But I think we could  
3 probably do that in a very short order as well.

4 THE COURT: Well, I assume, not only before this  
5 motion got filed, but certainly after this motion got filed,  
6 there have been some efforts to try and figure out what  
7 could be captured in 10, 11 and 12 that isn't already  
8 captured in 1 through 9.

9 MR. BIAL: Right. And I think if you look at some  
10 of what's cited in the reply brief to the complaint, it  
11 does, for some of those, when we're talking about 10, 11 and  
12 12, cite back to precisely the ones that you mentioned  
13 earlier, Bernanke, Poirot. So there is some of that in 10,  
14 11 and 12. But I don't believe -- my understanding of the  
15 government's position is that they're not limiting it to  
16 that kind of thing. I think, you know, again, bidding was  
17 mentioned, so that's the one that's on the table right now,  
18 and we've gotten that one cleared.

19 THE COURT: Well, bidding is mentioned in 11 and  
20 12. It seems to be the primary focus of 12. It says: "Any  
21 automated means or manner of bidding, whether on individual  
22 bids or on a campaign-level basis." So that seems to be  
23 bidding.

24 Eleven is: "Bid, price floor or auction  
25 optimization algorithm, product or feature." So 11 seems to

1 be -- I don't know whether price floor or auction  
2 optimization is part of bid or not. But 10 just talks about  
3 relating to products that determine which exchanges are. So  
4 that isn't -- is that -- how does that relate to bidding?

5 MR. BIAL: Well, I don't know that it does. I  
6 mean, we had a conversation yesterday about those three, and  
7 that was the one thing that was identified. And it was a  
8 discussion of the three as a whole rather than going one by  
9 one.

10 THE COURT: Okay.

11 MR. BIAL: And I should just mention --

12 THE COURT: Where are you on --

13 MR. BIAL: I didn't mean to interrupt.

14 THE COURT: Go ahead.

15 MR. BIAL: It's never been the case that we don't  
16 want to provide the information; it's really more of having  
17 the back-and-forth, which we were having until -- or we  
18 continue to have it, actually, after the motion to compel  
19 was filed. And I think that's what we were trying to  
20 accomplish. And I thought yesterday was a very productive  
21 step at that because we now heard bidding was of interest,  
22 and we were able to actually go with something specific like  
23 you see in 1 through 9.

24 THE COURT: Well, it's a little hard to understand  
25 how bidding just came to light as something of interest when

1 you look at 10 -- or certainly 11 and 12 that you've had in  
2 your possession for a couple of months now; right? That  
3 they were interested in bidding information. But that  
4 obviously seems to be something that is more focused at this  
5 point.

6 What about the guidebooks, dictionaries, that kind  
7 of information? Where are you on that issue?

8 MR. BIAL: Yes. So let me answer that in two  
9 ways.

10 First, we have a set of search terms. I mean, I  
11 didn't -- we didn't attach it to our complaint. It's  
12 20 pages and smaller than single-spaced. It's probably  
13 Size 8 font.

14 THE COURT: I probably wouldn't understand them  
15 either.

16 MR. BIAL: So it's pretty comprehensive.

17 We have that, and so they can run that. So I  
18 would think that those would hit on these manuals. So  
19 that's Number 1.

20 I think Number 2 -- and Your Honor put your finger  
21 on this. For better or for worse, I do antitrust; that's  
22 all I do. So when I'm working with an expert, I'm seeing  
23 their models, their code. I've never heard them ask for a  
24 how-to guide. I mean, they're the experts.

25 So, you know, I think they could be -- they have

1 that skill set. And I think Your Honor said in the  
2 March 26th hearing that experts can be working before they  
3 get the information. So presumably they can do that.

4 THE COURT: Yeah. But that, to some extent,  
5 counters your argument, that if an expert has some roadmap  
6 as to what this source code is intended to do or doing, when  
7 they get into the, you know, safe space room or whatever it  
8 is that they are limited in access and having information,  
9 they have a base of knowledge to start work on and they're  
10 not going in cold.

11 So there is some substance behind the request of,  
12 you know, help me understand -- give me a primer on what I'm  
13 going to be going in and looking at when I go in and start  
14 seeing -- I assume it's not a small set of information in  
15 the source code documents. I don't know how large it is.  
16 But it's something that, you know, an expert probably would  
17 want to have some general familiarity with what the process  
18 is or what terminology is being used or those kinds of  
19 things.

20 Why wouldn't that be of help to them and of need  
21 to them?

22 MR. BIAL: Well, I think it could be. And I'm not  
23 denying that a guidebook before you -- you know, you go into  
24 the secure room wouldn't be helpful to get you up to speed  
25 in advance.



1           We were asked that question, and we did run it to  
2 ground, and it was not this kind of guidebook. I mean, I  
3 guess there's -- I don't think they're talking about a basic  
4 guidebook; I think they're talking about something more  
5 complex than that to go into that room and be looking at the  
6 code in a short amount of time.

7           For that exercise, at least in the back-and-forth  
8 that we had, which was not insignificant, we were not able  
9 to locate those. Again, I would point back to the search  
10 terms, which I think -- if that doesn't turn something up, I  
11 think it probably really doesn't exist. But at least for  
12 the purposes of our collection and talking to the various  
13 individuals who we thought would have knowledge of that, we  
14 did not come across such a how-to guide.

15           THE COURT: Okay. Well, give me your  
16 understanding of where the parties are based on the  
17 conversation that you had yesterday.

18           MR. BIAL: Sure. I think in terms of the overall  
19 motion to compel, clearly we've resolved the successor  
20 custodians. And had we not done that this morning, I was  
21 going to tell you exactly that I thought we did and we  
22 would. So that was always going to be taken care of  
23 irrespective of the fact that we got it done this morning.

24           With respect to the source code, I think 1 through  
25 9, I think we can also agree that those are -- you know,

1 those are behind us. I think those are a meeting of the  
2 minds on those nine.

3 And 10 through 12, as I mentioned earlier, I  
4 think, you know, additional discussions between the parties  
5 on a short leash -- because I understand from what you said  
6 earlier, we don't have time for that -- would probably make  
7 the most sense. And I think if that meet-and-confer is not  
8 successful, that you'll hear from the government in very  
9 short order.

10 THE COURT: Okay. What about in -- you know,  
11 you're talking I think more directly about 39, but the other  
12 requests that are part of the guidebook dictionary --

13 MR. BIAL: Right. The materials.

14 THE COURT: -- and the materials.

15 MR. BIAL: Right. Right.

16 Again, same thing. I mean, originally I think the  
17 search terms were more geared toward that, but I think  
18 obviously if they collect that material, then the  
19 guidebooks, it would be helpful to them. And, as you  
20 pointed out, if they had something like that, it's helpful;  
21 it's not unhelpful. That process would turn that up.

22 THE COURT: Well, explain to me why it would be  
23 difficult for Google to find out whether there are -- and  
24 absent -- putting search terms aside and, you know,  
25 automatic -- you know, one would -- again, I don't know

1 Google, don't know how complicated all of this is, but it  
2 doesn't seem that difficult to find somebody at Google that  
3 would know whether they have such things as dictionaries or  
4 guidebooks or other kinds of information that one would, you  
5 know, want to -- even if they don't get hit on search terms,  
6 would be in a position to produce if they're there and  
7 exist.

8 MR. BIAL: Right. Well, let me give you an  
9 example. So pseudocode -- they asked for pseudocode central  
10 repository, and if that existed -- I mean, we absolutely  
11 went to the client, and they were not aware of such a thing.

12 And so I think, you know, the best answer to that  
13 is really going to those search terms. And if something  
14 were to turn up and we found out about it, we didn't know  
15 about it -- I think they're obviously doing good-faith  
16 searches -- we would turn it over immediately. They've made  
17 it clear that they want that sort of information. If we  
18 came across it, we would turn it over immediately.

19 THE COURT: Well, the problem you face -- and,  
20 again, I'm giving you a scenario that I hope would never  
21 happen -- is that you don't produce that kind of  
22 information, and that in the middle of a deposition,  
23 somebody talks about a dictionary, glossary or cultural  
24 guide that is well known within the Google team and the  
25 plaintiffs look at each other and say, did we get that? And

1 they say, no. I mean, that's why I'm asking you. Again,  
2 this is to make sure that you don't get yourself in  
3 trouble --

4 MR. BIAL: Correct.

5 THE COURT: -- is not just relying on these, you  
6 know, pages of search terms, but on some specific  
7 information, going out and making an individualized inquiry  
8 about does that kind of information exist, and, if so, where  
9 is it.

10 MR. BIAL: Right. Understood.

11 I mean, again, we would know as well once we do  
12 those searches and before the depositions begin. And if  
13 something turns up, they would get it. But I think you've  
14 made very clear that that's something that is expected and  
15 that would be something ordinarily pursued in discovery.

16 THE COURT: Okay. All right. Well, let me just  
17 hear a little bit more from government counsel.

18 MR. BIAL: Thank you, Your Honor.

19 THE COURT: Thank you.

20 Was the meet-and-confer yesterday in person or  
21 over the phone or Zoom or how was that done?

22 MS. GARCIA: Yesterday's meet-and-confer was on  
23 Microsoft Teams, Your Honor.

24 THE COURT: Okay.

25 MS. GARCIA: It was the, I want to say ninth

1 meet-and-confer we have had since the outset of our  
2 litigation since we were -- since we received Google's  
3 objections to our RFPs, including our source code RFPs in  
4 mid-April. That same week, we met and conferred with  
5 counsel -- not counsel from this firm, but counsel from  
6 another firm representing Google -- and began good-faith  
7 discussions about how Google could go about responding to  
8 this -- these requests.

9           During the course of that time, we had discussions  
10 about how Google's concerns with respect to source code had  
11 to do a lot with the fact that it was very highly sensitive,  
12 and we proposed an alternative if it existed.

13           We asked that Google go back to its client -- this  
14 was in early May -- and search for and ask if there was a  
15 central repository for pseudocode. Our understanding is  
16 that pseudocode is a plain-language explanation of source  
17 code.

18           We proposed that if Google could do this within a  
19 reasonable time and get our experts that material within a  
20 reasonable time -- which we would have discussed had they  
21 discovered a central repository -- we would take only two  
22 weeks with that source code and come back to them and say  
23 whether or not there is more information that we need or  
24 whether or not what they've provided should suffice. After  
25 three weeks, we were told there was no central repository

1 for pseudocode.

2 We continued to have good-faith discussions.

3 Yesterday's discussion with Mr. Bial was the first that he  
4 had joined, but it was not the first time that we have  
5 discussed this. We told counsel that -- going back to an  
6 earlier point, we told counsel that we would be prepared --  
7 if they told us that they were prepared to have our experts  
8 come in and examine the source code, that same day we would  
9 get them a list of names of individuals who could come in as  
10 soon as possible.

11 We would welcome the opportunity to speak with  
12 their data scientists about these issues. We haven't heard  
13 anything from counsel about that opportunity. But to the  
14 extent they're willing to have data scientists -- and I say  
15 "scientists" because I strongly believe that there's not  
16 going to be one person at the company who has this  
17 information.

18 THE COURT: Right.

19 MS. GARCIA: But if they're willing to have prompt  
20 discussions with those individuals, we would welcome that  
21 opportunity.

22 The first time that they told us that there wasn't  
23 clarity with respect to 10 -- Numbers 10 through 12 was  
24 May 26th in a letter that was --

25 THE COURT: What did the objections to those

1 requests say?

2 MS. GARCIA: Well, the objections, I'll say  
3 without looking, did describe -- object that they are vague.

4 THE COURT: I don't have the objections in front  
5 of me, but I suspect I know that they would talk about being  
6 vague or indefinite --

7 MS. GARCIA: Yes, they're --

8 THE COURT: -- or whatever; so ...

9 MS. GARCIA: Pardon me, Your Honor. Yes.

10 THE COURT: So, I mean, obviously you were put on  
11 notice within 15 days after you served it that that was a  
12 potential issue relating to what you had served.

13 MS. GARCIA: That's fair, Your Honor.

14 What we've tried to do is get to the heart of --  
15 to the extent that these vagueness objections were  
16 objections made to every single RFP that we posed, what it  
17 is that we can do in order to come to a meeting of the minds  
18 as to what these terms mean. And we've made good efforts  
19 with respect to several other RFPs.

20 THE COURT: All right.

21 MS. GARCIA: We haven't received a single document  
22 from anyone's custodial files responsive to any search terms  
23 to date. This information about manuals and data  
24 dictionaries and other important information that our  
25 experts need in order to have sufficient context to read the

1 code may not be in custodial files. It may be, but it may  
2 not be.

3 One concern that we raised yesterday was that we  
4 do not know when we will receive a production from Google of  
5 any documents that hit on any of the search terms in the  
6 exhibit that Mr. Bial brought today. So we can't tell you  
7 one way or the other whether or not the search terms are  
8 going to be sufficient.

9 We suspect that, given the tight timeline that our  
10 experts will be facing and the very strict rules in which  
11 they have to oblige in order to review the code, that  
12 they'll want this information more quickly than we would  
13 be -- otherwise be able to get if we waited for a production  
14 from Google responsive to search terms.

15 With respect to the central repository, that was  
16 part of our attempt to reach resolution and have a  
17 compromise that perhaps would have worked for Google. It's  
18 unfortunate that there is no central repository, but we  
19 don't mean to suggest that that should be the end of the  
20 inquiry. I think there are other good-faith steps that  
21 Google can and should take in order to identify any manuals  
22 or documents, which may not be one specific manual but may  
23 be a series of manuals or may be a series of dictionaries,  
24 or, you know, a compendium of information that other -- that  
25 others at Google have access to but that we just don't know



1 whether or not it exists.

2 We hope that the search terms we've agreed to in  
3 good faith with Google will be an effective and efficient  
4 way to obtain the information we need, but we don't  
5 understand why it is burdensome for Google to ask its own  
6 people whether or not this information exists and run that  
7 to ground. So we have concerns about timing.

8 THE COURT: And we all have concerns about timing.  
9 I mean, I think we all know the schedule that Judge Brinkema  
10 has set for us, and we all have to work within that  
11 schedule. And I'm sympathetic to both sides in this case.  
12 And I mean that. You have a lot on your plate getting ready  
13 to present a very large case against a very large company,  
14 and a very large company has a lot at stake in defending  
15 this case. But it's got to be done fairly and efficiently.  
16 And, you know, honestly, you all have worked together really  
17 very well to date. And I want to express my personal and  
18 the Court's appreciation for you all continuing to work  
19 together. I mean, I know I've got requests for a joint  
20 order yesterday that I need to look at before I enter it.  
21 But, you know, those are the kinds of things that the  
22 parties should be doing. It's in the interests of the  
23 United States to do that; it's in the interests of Google to  
24 do that, and I want to encourage you all to continue to do  
25 that.

1           This one, while I think very substantive  
2 meet-and-confers -- sometimes the numbers don't mean much;  
3 it's more of how the substance is going. You know, the  
4 substance of the meet-and-confer sounds like it started late  
5 last week and continued into this week, I mean, the real  
6 back-and-forth on exchanging some information.

7           You know, I've expressed to you all some concerns  
8 that I had on what was presented to me in the pleadings  
9 themselves as to not having a clear understanding of  
10 what's -- what you're moving to have them do that they  
11 haven't already agreed to produce, and I think you've  
12 provided me with some explanation as to that. I think I've  
13 explained why, you know, that kind of information is  
14 important and needs to be produced. Whether it is word for  
15 word what you have asked for in your document requests or  
16 not, I'm still uncomfortable with saying.

17           My suggestion with having more technical people  
18 involved in the discussion -- and, again, this is just -- I  
19 have done it in the past and have seen it to be successful;  
20 I've done it in the past and it hasn't been successful. I  
21 just want you to think about it and consider whether that is  
22 a way that -- you know, sometimes technical people  
23 understand what technical people need more than lawyers  
24 hearing from a technical person as to what he or she needs  
25 and then passing that information along and back and forth.

1 I'm going to defer ruling on this issue today.  
2 I'm going to give you two options, and you all can talk  
3 about which of the two options you want and how we go  
4 forward.

5 Option 1 is that we have another hearing next  
6 Friday on this issue and that you all report to me by the  
7 end of the day on Wednesday of next week as to where we are,  
8 and then I will decide it next Friday. One way or the  
9 other, somebody's going to be happy, and somebody's going to  
10 be sad.

11 The other issue -- and this would give you a  
12 little bit more time -- is that I would hear -- and it's  
13 unrelated but connected. It's probable that I am going to  
14 move the hearing that's set for two weeks from today to the  
15 day before, that is Thursday, at 2:00. There's some issues  
16 with some conflicts and things like that. So -- and I think  
17 that is a -- it would be specially set at 2:00 and will go  
18 as long as we may need depending on the issues there. And I  
19 think I'm going to get the opposition to that motion today.  
20 I think I have that calendared right. So the reply would  
21 come in at the end of next week.

22 So your two options are either decide whether you  
23 want me to hear this next Friday at 10:00 or the following  
24 week on Thursday at 2:00 in conjunction with the other  
25 motion to compel that has already been noticed that I'm

1 going to be moving to Thursday at 2:00. And if there's a  
2 problem with that Thursday at 2:00, let me know. I won't  
3 enter the order until Monday. So if there's some issue as  
4 to that, then maybe let me know by Monday which of the two  
5 options you would rather pursue.

6           There are benefits to both, and that's why I'm not  
7 picking one. I think the earlier, the better, but I'm  
8 giving you the opportunity. And, again, if you're inclined  
9 to have technical people involved in the discussions, you've  
10 got to schedule it and do it. So next week may be pushing  
11 it, but, again, we don't want to delay getting a decision so  
12 that we can keep things on track.

13           Any questions at this point?

14           MS. GARCIA: No. Thank you, Your Honor.

15           THE COURT: Anything else from the government?

16           MS. TARVER WOOD: Thank you, Your Honor. We  
17 appreciate it.

18           THE COURT: Anything else from Google?

19           MR. BIAL: No, Your Honor.

20           THE COURT: Okay. Well, thank you all very much.  
21 I appreciate it. You all have a nice weekend. Court will  
22 be adjourned.

23           (Proceedings adjourned at 11:53 a.m.)

24           -----  
25 I certify that the foregoing is a true and accurate

transcription of my stenographic notes.

Stephanie Austin

Stephanie M. Austin, RPR, CRR